No. 20442

United States Court of Appeals
For the Ninth Circuit

ANTHONY G. NOTARAS, *Appellant*,

vs.

F. C. RAMON and JANE DOE RAMON, his wife; ARTHUR DROVETTO and JANE DOE DROVETTO, his wife; DONALD F. HANSON and JANE DOE HANSON, his wife; and DONALD KOBLE and JANE DOE KOBLE, his wife, and the respective marital communities formed by each married defendant, *Respondents*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT

WRIGHT, WENDELLS, FROELICH & POWER
Attorneys for Appellant.

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STATEMENT OF PLEADINGS AND FACTS

Federal jurisdiction is invoked through 28 U.S.C. 1343, and 42 U.S.C. 1983. This is a "Civil Rights" case, involving unlawful detention of appellant by the appellees after a rightful (albeit mistaken) arrest, which was in turn based upon erroneous eye-witness identification.

The action commenced with filing a civil complaint in the District Court for Western District of Washington, in December, 1964 (Tr. 1). After the pleadings closed, and a trial date assigned, a pre-trial order was agreed upon by the attorneys in conference (Tr. 9). Although the pre-trial order was not signed until the trial (St. 141), the parties agreed that it should govern,

and the pleadings passed out of consideration.

The case was tried to the court without a jury, and following trial, an oral decision was rendered (St. 143). Thereafter, Findings of Fact and Conclusions of Law were entered by the trial judge (Tr. 15), and Judgment of Dismissal was entered August 2, 1965 (Tr. 21).

Appellate jurisdiction of this honorable court is based upon 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Appellant, a twenty-six year old concrete inspector, temporarily out of work, and supporting his family with two part-time jobs, was arrested by the Seattle police in Seattle, about ten o'clock Monday evening, January 20, 1964 (St. 5-7).

The reason for the arrest was "suspicion of having committed grand larceny." (Tr. 15, Finding of Fact I.)

He was at the time having a glass of beer in a downtown tavern, prior to going to work as a substitute bartender in a nearby tavern (St. 7). The reason for the arrest was identification by a cab driver as having been involved in a suitcase theft from the nearby Greyhound Bus Depot (St. 43).

Appellant was held by the Seattle police in the city jail without charge or bail from the time of his arrest Monday night, until almost noon the following Wednesday, January 22, 1964. These facts are not controverted (Tr. 10-11).

Appellant, upon his eventual release, was charged with two petty misdemeanors, convicted in Seattle Municipal Court, and thereafter acquitted by a jury in King County Superior Court (St. 21; Tr. 10-11).

Exercising his prerogatives as a private citizen, appellant thereafter sued for violation of his civil rights, based upon the detention without charge or bail. Appellant concedes the original arrest to have been rightful, although *post facto*, it apppeared to have been entirely mistaken (St. 60, 61).

Appellant was put through at least three police "lineups" (St. 15). It was not until after appellant spent one night incommunicado in jail that he was informed the reason for being arrested (St. 10).

Appellant's wife finally was told by Detective Moran of her husband's whereabouts on Tuesday (St. 51-52). That evening she was finally able to contact a lawyer who would take her case (St. 31, 35-36). She was without funds, and neither she nor her husband knew any lawyers.

Appellant was visited by his wife in jail on Tuesday, prior to obtaining a lawyer. They underwent the humiliation of visiting through a "little window" with a speaker with a jailer present (St. 36-37). She was required to gain "permission" in order to talk to her husband (St. 32; 36).

As the pre-trial order discloses (Tr. 10), a writ of

habeas corpus was served upon Appellee Ramon, as chief of police, on Wednesday morning, January 22. Either in response thereto, or coincidentally (inferences differ), appellant was formally charged and released on bail very shortly thereafter.

SPECIFICATIONS OF ERROR

The District Court erred in:

1. That portion of Finding of Fact X, reading as follows:

> "The investigation and inquiries made by Detective Moran both personally and through the assistance of other police officers, were reasonable, justified and legal in all respect." (Tr. 18)

2. The entirety of Finding of Fact XII, reading as follows:

> "The detention of the plaintiff in the Seattle city jail following his original arrest was for a period of time no greater or longer than was reasonable under the circumstances. The period of time between the original arrest and the charging of the plaintiff with a specific crime being reasonably necessary for the making of a reasonable investigation of all the facts and circumstances involving the larceny of said suitcases and the plaintiff's participation or lack of participation in said larceny." (Tr. 19)

3. The entirety of Conclusion of Law III, reading as follows:

> "That the detention of the plaintiff in the city jail beyond the hour of his arrest was for a period of time no greater or longer than was reasonable and no greater or longer than was reasonably neces-

sary for the making of a prompt and expeditious investigation of plaintiff's participation or lack of participation in a theft of suitcases from the Greyhound Bus Depot in Seattle, Washington." (Tr. 20)

4. The entirety of Conclusion of Law IV, reading as follows:

> "That the conduct of all defendants involved herein as shown by the evidence was valid and legal in all respects and not prohibited by any statute or common law of the State of Washington." (Tr. 20)

5. The entirety of Conclusion of Law V, reading as follows:

> "That the plaintiff's complaint should be dismissed with prejudice as to all defendants and all defendants should be awarded a judgment against the plaintiff for their taxable costs and disbursements herein." (Tr. 20)

6. In entering Judgment of Dismissal August 2, 1965. (Tr. 21)

STATEMENT OF POINTS

Appellant has filed a concise statement of points, setting forth the following points upon which he relies in this appeal:

1. The District Court adopted an erroneous rule of law by holding in effect that appellee Ramon was entitled to detain appellant Notaras a "reasonable" length of time without formal charge or bail while investigating the arrest and determining the charge.

2. The arrest, while mistaken, was lawful. Any deten-

tion of appellant Notaras by appellee Ramon, without charge and without bail, while the courts were open, was unlawful.

3. Appellant Notaras was entitled to compensation, and punitive damages, for his unlawful detention.

CONCISE ARGUMENT OF THE CASE

Summary of Argument

Herein, all specifications of error will be argued together, insofar as they relate to the law of the case. Damages will be discussed separately, but as appellant will mention, this court will not be asked to determine damages.

The District Court decided the case upon a fundamentally wrong basis, No statute, rule, or case decision authorized the conduct which the District Court stamped with a judicial seal of approval.

The District Court held that the appellees had a reasonable length of time in which to investigate the charge, while depriving appellant of his liberty, so as to decide what crime, if any, to charge appellant. Unless and until a charge was placed against appellant, he was deprived, wrongfully, of the right to bail, and, liberty. Therefore, appellant's liberty was at the mercy of appellees, while they made up their minds what charge to place against him, or indeed, whether to place any charge against him.

The case law of the State of Washington and the

Ninth Circuit has condemned this procedure.

Ulvestad v. Dolphin, 152 Wash. 580, 278 Pac. 681 (1929).

Housman v. Byrne, 9 Wn.2d 560, 115 P.2d 673 (1941).

Von Arx v. Shafer, 241 F. 649 (CCA 9, Alaska 1917).

Runnels v. United States 138 F.2d 346 (CCA 9, Wash. 1943).

Additionally, 42 U.S.C. 1983 is violated when state officers make an arrest and imprison the person without due process of law. Such conduct is "acting under color of state law." *United States v. Classic* 313 U.S. 299, 61 S. Ct. 1031, 85 L.Ed. 1368 (1941).

The theory, standard, and measure of damages which should have been applied by the district court are succinctly set forth in *Hague v. C.I.O.*, 101 F.2d 774 (CA3, N.J. 1939), *Antelope v. George*, 211 F.Supp. 657 (Ida. 1962), and *Basista v. Weir*, 340 F.2d 73 (CA 3, Penn. 1965).

Argument of Appellant

Appellant does not complain of the original arrest. Though it subsequently appeared that the wrong person had been arrested, no legal rights of appellant were invaded, *at that time.* Had appellant been charged with grand larceny (the offense for which he ostensibly was arrested), his bail would have been fixed automatically. Whether or not appellant could have made this bail is

not determinative; the issue is whether a bail was set. If appellant then contended his bail to be excessive, other remedies would have been available to him. He would, in any event, have been eligible for release and his personal liberty restored to him without depending upon the pleasure of the appellees.

It may be noted that when appellant was finally charged (Tr. 10), his bail was fixed, and appellant's liberty was restored as a matter of practice and procedure.

The wrong occurred when appellant was detained for a non-existent crime; to-wit, "suspicion of having committed grand larceny." (Tr. 15.) "Suspicion" is not a crime in the State of Washington, nor the City of Seattle, and no authority need be cited to that. A "booking" is not a criminal charge; it is simply the mechanical method of receipting for the prisoner and admitting him to custody.

The record is replete with testimony from appellee Ramon, Seattle chief of police, that his opinion, and the known procedure of the department of which he is chief, is that this detention without bail or charge, is proper. (St. 90-116; esp. St. 92, 95.) As a matter of fact, on the day Chief Ramon testified at the trial of this case, his department was holding "Two, three" men on "suspicion of felony" without charge, and without bail. (St. 114, 115.)

There is no excuse for this flagrant violation of citi-

zen's rights. The Seattle Police Department, and appellee Ramon, is furnished legal advice from the Corporation Counsel of the City of Seattle, the King County prosecuting attorney's office (St. 111).

Even appellee Ramon, who has made personally maybe three thousand arrests in his over twenty-four years as a law enforcement officer (St. 86), testified as follows:

"Q. Is there any reason why a follow-up investigation such as interviewing witnesses, reverifying physical facts, and so on, cannot be made when the defendant is on bail?
A. No. there is not." (St. 109.)

Appellees also produced the testimony of an "expert" on the question of proper police procedure to follow in criminal investigations. (St. 116-139.) Appellant objected to this testimony on the grounds of irrelevancy. (St. 3, St. 117, St. 121.) The District Court, while sustaining a similar objection to such testimony from appellee Ramon (St. 105-106), overruled the objection. (St. 117.)

The reason for appellant's objection is that the law is not to be decided by "customary police procedure" but, rather, by reference to the statutes and decisions of courts which have considered the issue.

Appellee's expert, Harold Booth, then testified:

"Q. Can investigations in felony cases be made when a defendant is on bail? Yes or no.
A. On what charge, sir.

Q. Any felony case.
A. Yes. Of course they can be made.
Q. How about a grand larceny case, can't an investigation be made such as you have described as being very important, can this be made if the defendant is on bail?
A. Yes.
Q. It is not necessary that the defendant be detained in custody to do the type of follow-up investigation you testified to, is it?
A. It can be done, it is possible." (St. 134, (cross-examination.)

Washington State Constitution and Statutes

The Washington State Constitution provides as follows:

1. Article 1. Sec. 3: Personal Rights.
No person shall be deprived of life, liberty or property without due process of law.

2. Article 1, Sec. 20: Bail When Authorized.
All persons charged with crimes shall be bailable by sufficient sureties except for capital offenses when the proof is evident, or the presumption great.

3. Article 1, Sec. 32: Fundamental Principles.
A frequent recurrence to fundamental principles is essential to the security of individual right and perpetuity of free government.

The law of Washington provides as follows:

R.C.W. 10.19.010: Bail, When Allowable.

Every person charged with an offense, except that of murder in the first degree where the proof is evident or the presumption great, may be bailed by sufficient sureties, and bail shall justify and have the same rights as in civil cases, except as otherwise provided by law.

Washington Case Authority

"In determining whether there has been an invasion of civil rights, lawfulness of the arrest must be measured under state law." *Antelope v. George*, 211 F.Supp. 657 (Ida. 1962), at 659.

No Washington State case authority in point appears to have discussed this as a matter of civil rights. Traditionally, the issue has developed in the state courts within the framework of a civil action for illegal detention, false imprisonment, or false arrest.

Two opinions appear clearly to define appellant's rights, as a matter of right under state law.

(1) *Ulvestad v. Dolphin*, 152 Wash. 580, 278 Pac. 681 (1929).

The Seattle chief of police was sued for unlawful arrest and false imprisonment. The State Supreme Court (5-3 *en blanc*) reversed for erroneous instructions, and upheld the right of action.

> "Nor is a police officer authorized to confine a person indefinitely whom he lawfully arrests without a warrant. It is his duty to take him before some court having jurisdiction of the offense, and make a complaint against him, and, from thence on, act with reference to the accused under the orders of the court. If a court having jurisdiction of the offense is open for the transaction of business at the time of the arrest, he must take the person arrested at once before the court. If no such court is then open, he may confine him until such time as the court does open, but he must act with reasonable promptness. Any undue delay is unlawful

> and wrongful, and renders the officer himself and all persons aiding and abetting therein wrongdoers from the beginning." (at 589-590)

Ulvestad also settles a contention made by appellees Ramon in instant case; i.e., that he had no actual knowledge of appellant's arrest, and therefore committed no invation of appellant's rights. A similar contention was made in *Ulvestad,* and forcefully denied. Since the charter of the City of Seattle in effect then and in effect now provided that the chief of police is the "keeper of the city prison," the court stated as follows:

> "As keeper of the city prison, the chief of police is bound in law to know who is confined therein, and bound to know the purpose for which any person confined therein is so confined. He cannot escape his obligations in this respect by placing the prison in the keeping of others. If he does so, such others are his agents and he is responsible for their acts. . . . (S)ince the chief of police suffered the appellant to be confined in the prison without lawful authority, he actively participated in the wrong, and is liable to answer for the wrong. In such cases there can be no division or splitting of liability." (*Ulvestad*, at 585-586.)

(2) *Housman v. Byrne*, 9 Wn.2d 560, 115 P.2d 673 (1941).

Where a sheriff was sued for false imprisonment arising from his arrest of appellant without a warrant, and confining him without charge or bail for eleven days, and the trial court withdrew the count of false imprisonment from the jury's consideration, the Supreme Court reversed, stating in part as follows:

> "It is admitted by the appellant that, even though the arrest was made without a warrant, it was, nevertheless, legal. It is the general, if not the universal, rule that, when a person is arrested and placed in jail, and is detained there for more than a reasonable time, the detaining officer is liable in an action for damages." *Housman*, at 561.

The opinion then cites, and quotes from *Harness v. Steele*, 65 N.E. 875 (Ind.), a discussion of the rights and responsibilities of a police officer who arrests without a warrant. It is stated that such an officer cannot legally hold the person in custody longer than is necessary under the circumstances to obtain a proper warrant, and authorization. If detention lasts longer than such time as is required to obtain court authority, then false imprisonment results.

Even though *Housman* does not cite or discuss *Ulvestad*, *Housman*, reaches exactly the same conclusions; i.e., *detention following arrest without a warrant is justified only until the courts are open to issue process and admit the prisoner to bail.* In the instant case, it cannot be denied that Municipal Court and Superior Courts were open by 9:30 a.m. the morning following appellant's arrest.

Appellant takes it as self-evident that his right to personal liberty is wonderful, precious right, to be jealously guarded. If under applicable state law appellees had a right to arrest him without a warrant (and this is conceded), then under the same state law, appellant had a right to be charged promptly in order that he be

promptly admitted to bail and re-secure his personal liberty. Failure of appellees to do so, when clearly required to, constituted a callous flouting and disregard of appellant's personal liberty which amounted to an invasion of his civil rights, and redressable under federal law.

Because a separate and original cause of action was created by Title 42, §1983, and Title 28, §1343, for deprivation of civil rights under color of state law, a right which is federal in origin and cognizable only in federal courts, there is no election of remedies to be made by appellant. It would be no defense that a state remedy may be available, or that appellant did not first avail himself of a state remedy.

McNees v. Board of Education, 83 S.Ct. 1433, 373 U.S. 668, 10 L.Ed.2d 622 (1963).

Monroe v. Pape, 81 S.Ct. 473, 365 U.S. 167, 5 L.Ed.2d 492 (1961).

An extensive and recent annotation at 98 ALR2d 966 discusses Delay in Taking Before Magistrate or Denial of Opportunity to Give Bail as Supporting Action for False Imprisonment. Many state cases are cited and discussed, and it appears to be a general rule, subject to various exceptions, that most states regard such delay to constitute actionable false imprisonment. Mitigating circumstances may be intervening Sundays or judicial holidays, impaired mental or physical condition of pris-

oner, public riot, waiver or consent to delay by prisoner, ten-minute deviation for sheriff to drink a beer (consented to by prisoner). Any of these may be and have been accepted as sufficient excuse to account for delay. *None of these circumstances were present in the instant case.* In most jurisdictions, delay for purpose of investigation is not an acceptable excuse. 98 ALR2d 1011, §17(a).

Federal Statutes

28 U.S.C. §1343:

> "The district courts shall have original jurisdiction of any action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States."

42 U.S.C. §1983:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subject, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1985:

> "(3) If two or more persons in any state . . .

> conspire . . . for the purpose of depriving . . . directly or indirectly, any person . . . of the equal protection of the laws, or the equal privileges and immunities under the laws . . . the party so injured or deprived may have an action for the recovery of damages . . ."

Federal Case Authority

The action of appellees, and procedures of the Seattle Police Department, have been denounced most emphatically by the Ninth Circuit in at least two decisions.

(1) *Von Arx v. Shafer*, 241 F. 649 (CCA 9, Alaska, 1917).

> ". . . (A) gross and wanton outrage was committed upon the plaintiff. . . . He was arrested and deprived of his personal liberty, the right to which is most jealously guarded in American jurisprudence, and imprisoned in jail for a period of 21 hours without a warrant, without the semblance of legal process, and upon no charge of violation of law." *Von Arx*, 650.

It would be difficult to find a more apt expression of the circumstances of the instant case!

(2) *Runnels v. United States*, 138 F.2d 346 (CCA 9, Wash. 1943).

> "While Washington appears to have no statute on the subject, in that state, as elsewhere in this country, it is the duty of a peace officer who has effected an arrest without a warrant promptly to take the person before a magistrate. This directive is not something which the officer is free to comply or ignore according as he may think the exigencies of the situation demand; it is a fundamental imperative designed to safeguard the individual in

a free land against the arbitrary exercise of power." *Runnels*, 347.

The language of *Runnels*, set forth above, foretold with clarity the action of appellees herein. Appellees felt that the exigencies of the situation permitted them to detain appellant without charge or bail while they decided what charge (if any) to place against him. (St. 59, line 11.)

In truth, the record discloses the automobile of appellant was afforded more tender care and control than were his personal rights! (St. 48, line 18; St. 49, line 7; St. 52, lines 1-6.) During the time that so much attention was being directed toward appellant's automobile, his personal liberty was taken away from him. When a police officer considers the possible impounding of an automobile (St. 49, line 5) to be more important than liberty, it is no wonder the court in *Runnels*, and the Constitution of the State of Washington contain the pronouncements that any civics teacher should consider elemental.

The District Court saw fit to decide this case without reference to the settled law of the State of Washington, and the Ninth Circuit. Instead, the rationale of the decision appears to be that the police *should* have a right to detain, without charge, for some indeterminate length of time, while investigations are conducted. Even appellee Ramon and witness Booth testified that their investigations could be made with

detainee out on bail. (St. 109, St. 134.)

This rationale is not the law as appellant conceives it to be, and if it were, it would be despotic.

> "It is not the function of the police to arrest, as it were, at large, and to use an interrogating process at police headquarters in order to determine whom they should charge before a committing magistrate on 'probable cause'". *Monroe v. Pape*, 81 S.Ct. 473, 365 U.S. 167, 5 L.Ed.2d 492 (1961).

Damages

The District Court, of course, never reached the question of damages, by virtue of its judgment of dismissal. However, a brief discussion is in order for appellant contends the decision should be reversed, and remanded for such consideration by the District Court.

For comparative purposes, it is noteworthy that the State of Washington has held the following elements to be compensable under a state action for false imprisonment: mental suffering, anguish of mind, sense of shame, humiliation, and loss of social reputation. *Hayes v. Hutchison & Shields*, 81 Wash. 394, 142 Pac. 865 (1914).

Action for damages for deprivation of civil rights sounds in tort, and exemplary or punitive damages may be awarded. *Hague v. C.I.O.*, *supra.*

Mental suffering is a proper element of damages, and a physical tort need not be shown to justify. *Antelope v. George*, supra; *Nash v. Air Terminal Service*, 85 F.

Supp. 545 (C.C. Va. 1949) (Civil Rights Act inapplicable under *Nash* circumstances).

Wilfulness of defendant's conduct, and the indignity and humiliation suffered by plaintiff, are compensable elements. *Antelope v. George, supra.*

The well-reasoned opinion in *Basista v. Weir*, 340 F. 2d 74 (CA 3, Pa., 1965) discussed and analyzed damages, amounts and standards at some length, under federal civil rights statutes. The following points appear therefrom:

1. The benefits of the Civil Rights Acts were intended to be uniform among the various states, notwithstanding varying state damage rules.

2. 42 U.S. § 1983 is silent as to the kind of damages to be awarded, but does connote the award of damages of some kind.

3. Federal common law of damages applies in such cases.

4. Federal law permits the recovery of punitive or exemplary damages, and state damage rules do not pertain. (The State of Washington prohibits punitive damage awards.)

5. Nominal damages do not have to be alleged; proof of deprivation of a right to which plaintiff is entitled is sufficient.

6. Exemplary or punitive damages may be awarded

under settled federal law, even though only nominal actual damages are shown.

7. In this area of rights, society permits the offending party to be fined, and such fine awarded the injured party, in view of the peculiar interests and valuable personal rights involved.

Basista, supra, pp. 84-88.

CONCLUSION

The District Court decided this case upon a fundamentally wrong basis. It is not the law of the State of Washington, or of the Ninth Circuit, that law enforcement agencies may detain without charge or admission to bail while they investigate to determine what type of charge to place.

Even though an arrest without a warrant may be rightful, the subsequent detention without charge may become unlawful. The law of the State of Washington is very clear on this point.

The judgment of dismissal should be reversed, with instructions to enter a judgment for appellant, embodying damages based upon the testimony taken in the case, and measured by the standards of *Hague*, *supra*, and *Basista*, *supra*.

The only way by which the chief of police of Seattle, appellee Ramon, may be convinced of the utter wrongfulness of his procedure, is to suffer damages for the

unlawful detention of appellant in this case. Others will benefit, if appellant's wrong is redressed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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